United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 13, 2000

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Comar, Inc.
Case 4-CA-28570

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This Section 8(a)(5) case was submitted for advice on the issues of whether the Employer unlawfully refused to engage in effects bargaining and to recognize the Union when it merged a unit into a plant whose employees are unrepresented and where the represented employees are now a minority.

FACTS

Since 1985, the Employer and the Union entered into a series of collective-bargaining agreements covering a Vineland, New Jersey facility, the last a three-year contract with an expiration date of September 30, 1999. By 1999,[1] the Employer had, among others, a glass plant in Vineland and a headquarters and a plant consisting of two buildings in Buena, New Jersey, about 8 miles from Vineland. The Employer manufactures plastic eye droppers at both plants. None of the Buena employees are represented.

By letter dated April 27, the Employer informed the Union that it was considering consolidation of some of its plants, and that it might close the Vineland plant. The letter invited the Union to contact the Employer if it desired to bargain. By letter dated May 4, the Union asked the Employer how far the decisional process had come, asked for all relevant studies which had been conducted to date,

[1] Unless otherwise indicated, all dates are in 1999.

and stated that it reserved the right to engage in decision and effects bargaining. By letter dated May 27, the Employer supplied studies setting forth various consolidation possibilities and also said that if the Vineland plant were selected for closure, the closure could occur as early as the summer or early fall. By letter dated June 25, the Union asked the Employer to notify it immediately of any decision so that the Union could exercise its bargaining rights.

By letter dated July 1, the Union informed the Employer that it desired to negotiate a new contract to replace the contract which would expire on September 30. On July 15, the Employer's Board of Directors authorized the consolidation of the Vineland plant into an unspecified facility and notified the Union of this by letter dated July 16. The Employer also stated that it would be willing to meet at a reasonable time to bargain.

On July 20 the Employer met with the Vineland unit employees. According to the Union, the Director said that the machinery would be moved intact from Vineland to Buena; that the unit employees would be a separate operation at Buena; that substantially all the unit employees would be offered employment at the new location; that the seals' department (which manufactures aluminum crimp for medicine bottles into which needles are stuck) would move from Buena to Vineland; and that savings would be realized because quality control and warehousing functions could be combined. The Director said that wages and benefits would be reduced.

By letter dated July 20, the Union asked that the Employer offer displaced employees other employment and said that the Union had assigned two representatives to schedule "severance negotiations." By letter dated July 22, the Union's counsel said the Union had just learned that the Employer was going to move the operation only a few miles and continue to utilize the same workforce. He said that the Union reserved its right to bargain a new contract and, in the alternative, to take the position that the current contract continues to apply and that the bargaining unit continues to exist.

During a meeting on September 8, the Union proposed a three-year contract and again asked how the consolidation

would affect the unit employees. The Employer provided the same information it had provided on April 27, including an Arthur Anderson analysis of various consolidation possibilities.[2] The Employer stated that the Vineland unit would be merged into the overall operations of the Buena plants, that the unit employees would no longer enjoy separate supervision, and that the move would commence on September 15 and be complete by September 30. The Employer suggested that the parties discuss which employees would be moving and which would not. The meeting ended without any substantive agreement. On September 9, the Employer provided additional information, including what it termed as "proposed" wage rates, health benefits and hours of operation, but not details about the location of the former unit employees in the Buena plant.

On September 14, the parties discussed the job bidding procedure for Buena and the Union presented a severance proposal for the employees who would not transfer. The Union requested information about the location of the machinery at Buena, the supervisory structure, and the hours of operation. The parties agreed that the request and answer both be in writing. Therefore, by letter dated September 20, the Union requested information about

> management's plan with respect to both the move itself and the operation of the new facility, including but not limited to physical location within the Buena facility, supervisory structure, staffing, hours of operation and other terms and conditions of employment.

By letter dated September 21, the Employer responded with the dates that the machinery would be moved, the work shift schedules, wage rates and health benefits, but not the rest of the information the Union had requested. The layout of the operation would be determined as the Employer "assimilated this equipment and the persons into the plant."

On September 27, about 20 of the 40 Vineland employees began work at Buena. Apparently at the same time, the

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[2] The Employer explained that it understood that the Union negotiators had not received the information from the Union.

seals' department and its machinery moved from Buena to the Vineland plant. The machinery formerly used by the unit employees is scattered throughout the Buena facility's two buildings which are also occupied by nonunit employees performing similar functions. The former Vineland employees share the same supervision, shift schedules and lunch room, wages and benefits.

By letter dated October 7, the Employer offered to provide any further information that the Union might wish, and offered to meet to discuss the effects of the closure of Vineland. By letter dated October 12, the Union responded that the Employer had not yet provided the information requested by the Union. The Employer has not provided any further information, and bargaining has lapsed.

The Employer now employs about 105 employees in its "finishing department" in the Buena plants, including the 20 "applicator" department employees who transferred from Vineland, 19 new hires, and 65 employees who worked at Buena before the transfer. The Employer states that it plans to crosstrain the Buena employees to use different machines, including both those moved from Vineland and those which were at Buena before the move.

The Region has concluded that the Employer has violated Section 8(a)(5) by failing to provide requested relevant information.

ACTION

We concluded that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by refusing to engage in complete effects bargaining, including the wages, hours and working conditions that Vineland employees would have at Buena. We further concluded that the former Vineland employees no longer constitute an appropriate unit; accordingly the Employer lawfully refused to recognize the Union. [*FOIA Exemptions* 2 and 5 [3] , .][4]

[3] [*FOIA Exemptions* 2 and 5 .]

1. Effects bargaining includes the wages, hours and working conditions that the former Vineland employees would receive at Buena.

In First National Maintenance,[5] the Supreme Court affirmed that, upon request, a union must be given a "significant opportunity" to bargain over the effects of a facility closure, and that such bargaining "must be conducted in a meaningful manner and at a meaningful time. . . ." In order to satisfy this obligation, an employer must provide timely notice of closure,[6] and must furnish relevant information that is necessary to assist the union's performance of its role as collective-bargaining representative.[7]

Among the effects that an employer is required to bargain about when relocating operations are the "bases and conditions on which employees affected by the termination may transfer to the new location and thus continue to be employed."[8] In Otis Elevator (Otis III),[9] the Board and

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[4] [*FOIA Exemptions* 2 and 5

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[5] First National Maintenance Corp. v. NLRB, 452 U.S. 666, 681-82 (1981).

[6] Willamette Tug and Barge Co., 300 NLRB 282, 282 (1990); Los Angeles Soap Co., 300 NLRB 289, 289 n.7, 295 (1990) (absent special or emergency circumstances, an employer must provide pre-implementation notice in order to bargain over effects).

[7] Sea-Jet Trucking Corp., 327 NLRB No. 107, slip op. at 8 (January 29, 1999) ("The duty to supply information is an aspect of the duty to bargain in good faith, and the Respondent is obligated to reply to an information request in a fashion which is consistent with the principles of good faith"); Sierra International Trucks, Inc., 319 NLRB 948, 950 (1995) (same).

[8] Westinghouse Electric Corp., 174 NLRB 636, 637 (1969).

Administrative Law judge (ALJ) discussed what effects are included in "effects bargaining" involving a decision to transfer unit work to another facility. The ALJ found, and the Board agreed, that the effects about which the employer was required to bargain included "the order of layoffs, recall, severance pay, input in the selection process, the transfer package, i.e., moving expenses and a host of related considerations, particularly meaningful to the Union and the unit employees affected."[10] The ALJ further found that these matters were amenable to bargaining "exclusive of the Union's power or right to reverse Respondent's 'decision.'"[11]

In Holly Farms Corp.,[12] the Board concluded that although the Respondents (Holly Farms and its successor) did not have an obligation to bargain over the decision to integrate operations, they did have an obligation to bargain over the decision to offer Holly Farms employees employment as Tyson's employees under Tyson's terms and conditions of employment "as an effect of the integration decision." Thus, the Respondents were obligated to bargain "about the various ways in which the integration might affect the employment status and wages and benefits of the former Holly Farms drivers." 311 NLRB at 278.

Initially, we note that the Union made a timely request for effects bargaining. Not only did the Union consistently request information relevant to its right to engage in effects bargaining, and requested "effects" bargaining from the time it learned of the Employer's relocation decision, but it also proposed a contract which covered the Vineland employees' working conditions, including wages and benefits. Since the Union had a legitimate interest in the wages, hours and working conditions of the former Vineland employees, its demand for

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[9] 283 NLRB 223 (1987).

[10] Id. at 229.

[11] Id. See Burkley Envelope Co., Case 17-CA-14836, Advice Memorandum dated December 15, 1990.

[12] 311 NLRB 273, 277-79 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995).

a collective-bargaining agreement was in substance a demand for effects bargaining. Although the Employer engaged in some bargaining, it prevented the Union from engaging in complete effects bargaining since it failed to provide necessary, relevant information regarding legitimate employee interests, i.e., the physical location within the Buena facility, supervisory structure and staffing to be applied to the relocated applicators jobs. The Union has requested this information since September 8. Further, the Employer presented the Union with a "fait accompli" as to the wages and benefits that Vineland employees would receive at Buena, and even announced to unit employees on July 20 that their wages and benefits would be reduced.

2. As the former Vineland employees no longer constitute an appropriate unit, the Employer was not obligated to recognize the Union as the exclusive bargaining agent of any employees at Buena.

Vineland unit employees only consititute 20 out of 84 employees working side by side at the same jobs in Buena. These employees have been fully integrated into the Buena operation. The Union's reliance on Holly Farms, 311 NLRB at 277-279, for the proposition that the Employer is obligated to recognize the Union, is misplaced. In Holly Farms, in addition to concluding that the Respondents failed to engage in "effects" bargaining, the Board also concluded that the Respondents prematurely withdrew recognition "when they announced the plans for integration and stated that upon such integration the bargaining unit would cease to exist." The Board reasoned that when the plans were announced, there was no integration of operations or even detailed plans for implementation of the integration." Id. at 279.

In contrast, the Employer here withdrew recognition only after Vineland employees were fully integrated into the Buena operations. Thus, since the Union did not have majority status in the unit at that time, there was no bargaining obligation. Further, unlike the facts in Holly Farms, where the Respondents relied on new "pay, work locations, schedules, and other terms and conditions of employment"[13] to withdraw recognition during the certification year, the Employer here does not rely on

[13] 311 NLRB at 279, n.25.

unlawful unilateral changes to support its contention that the bargaining unit is no longer appropriate. Rather, the Employer located the transferred machinery throughout the Buena plant so that the 20 transferred Vineland employees now work side by side with 84 other employees, performing similar job duties. Moreover, the Employer did not unilaterally transfer work away from former Vineland employees, as Buena employees historically had performed similar job duties. Although Vineland employees have had their wages and benefits unlawfully changed since the Employer did not fulfill its "effects" bargaining obligation, these working conditions are not the basis for concluding that a unit of 20 Vineland employees is not appropriate and that they have been successfully merged into the overall Buena unit.[14]

3. [*FOIA Exemptions* 2 and 5]

[*FOIA Exemptions* 2 and 5

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B.J.K.

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[14] See Kelly Business Furniture, 288 NLRB 474 (1988).

[15] [*FOIA Exemptions* 2 and 5

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